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In the Supreme Court of the United States

OCTOBER TERM, 1976

HARRY LUPO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 538 F. 2d 972.

JURISDICTION

The judgment of the court of appeals was entered on June 7, 1976. A petition for rehearing with a suggestion for rehearing *en banc* was denied on July 19, 1976. Mr. Justice Brennan extended the time for filing a petition for a writ of certiorari to and including August 6, 1976, and the petition for a writ of certiorari was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner's voluntary statements to FBI agents who served him with a grand jury subpoena should be suppressed because the subpoena required his attendance "forthwith."

2. Whether 18 U.S.C. 3501, which states that voluntary confessions "shall be admissible in evidence," is unconstitutional.

STATUTE INVOLVED

18 U.S.C. 3501 provides in pertinent part:

> (a) In any criminal prosecution brought by the United States * * * a confession * * * shall be admissible in evidence if it is voluntarily given.
>
> (b) The trial judge in determining the issue of voluntariness shall take into consideration all the circumstances surrounding the giving of the confession * * * .

STATEMENT

Following a jury trial in the United States District Court for the District of New Jersey, petitioner was convicted of having converted records of the United States to his own use, in violation of 18 U.S.C. 641, and of conspiring to do so, in violation of 18 U.S.C. 371. Petitioner was sentenced to six months' imprisonment and a fine of $1,000 on the conspiracy count and to a suspended one-year sentence and five years' probation on the substantive count. The court of appeals affirmed (Pet. App. A).[1]

The facts are summarized in the opinion of the court of appeals (Pet. App. 4a-5a). They show that petitioner was a co-conspirator in a scheme whereby an FBI

[1]Before trial, co-defendants Irene Klimansky and George Kuczynski pleaded guilty to conspiracy to violate Section 641. Co-defendant John Grillo was acquitted by the jury of both the conspiracy and the substantive charge. Co-defendants John DiGilio and Peter Szwandrak were convicted of both charges. The court of appeals vacated the sentences as to those two defendants and remanded for further proceedings in the district court.

employee made copies of confidential FBI reports regarding an ongoing investigation and then passed the copies to the subject of the investigation (Tr. 75, 78-84, 95-96, 283, 288, 304-305, 875-879, 1402-1403).

Petitioner explained his role in the criminal scheme during an interview with FBI agents on July 14, 1974. The facts leading to and surrounding petitioner's statements were summarized by the court of appeals as follows (Pet. App. 19a-20a):

> FBI agents approached Lupo at his place of employment at 8 a.m. on July 14, 1974, identified themselves, and indicated they wished to question him about the theft of the DiGilio records from the FBI office. The agents advised Lupo of his *Miranda* rights and he signed a *Miranda* waiver. At Lupo's request the agents drove him from his place of employment to conduct the interview. When this interview proved fruitless the agents served on him a grand jury subpoena, signed by an attorney of the Organized Crime Strike Force, commanding Lupo to appear before the federal grand jury in Newark "forthwith." They also advised Lupo to go to the Newark federal courthouse at once. Lupo elected to accompany the agents in their car. They drove to the FBI office, where Lupo remained from 9 a.m. to 2 p.m. During this five hour period Lupo made some incriminating statements. He was then taken to the office of the Organized Crime Strike Force, where agents interrogated him for another two hours. He was then taken to the office of the United States Attorney, who questioned him for an additional 15 minutes. Lupo was then taken to the United States Marshal's office at 4:30 p.m. to await his appearance before the grand jury which was then in session. About this time he requested that his

grand jury appearance be postponed so that he could talk with his wife. The FBI agents then drove Lupo to his home, where further conversations took place in front of his wife.

ARGUMENT

1. Petitioner contends that the government's use of a "forthwith" subpoena denied him due process because it somehow foreclosed his opportunity to apply to the district court for relief from the subpoena (Pet. 6). Even if the procedure followed did prevent petitioner from challenging the subpoena, that is irrelevant in the context of this case, since petitioner was not in fact taken before the grand jury "forthwith," and, indeed, upon his subsequent representation that he would refuse to testify, never appeared before the grand jury at all.[2] Thus, assuming that a "forthwith" subpoena somehow taints any ensuing grand jury proceeding, no such proceedings occurred in this case, and accordingly petitioner cannot reasonably claim that his inability, if any, to challenge the grand jury subpoena infected his conviction.

Petitioner also asserts that the use of the "forthwith" subpoena violated his Sixth Amendment right to counsel (Pet. 6-7). But there is no Sixth Amendment right to appointed counsel at this stage of the proceedings (see *Kirby* v. *Illinois*, 406 U.S. 682; *In re Groban*, 352 U.S. 330), and there is no suggestion here that petitioner ever asked to consult with retained counsel.[3] Again, however,

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[2]See transcript of the hearing on petitioner's motion to suppress, p. 64.

[3]Indeed, when the FBI agents first approached petitioner, they gave him full *Miranda* warnings which included the advice that he was entitled to the assistance of counsel before answering any questions. Petitioner then signed a waiver form indicating, *inter alia*, that he did not desire counsel.

the fact that petitioner never appeared before the grand jury precludes him from arguing that the government took unfair advantage of him in the grand jury by forcing him to appear before he had had opportunity to consult with counsel. In short, petitioner can show no prejudice from his failure to consult with counsel, making it unnecessary to consider whether that failure was in any way connected with a "forthwith" subpoena.

We do not contend that the use of a "forthwith" subpoena would be proper as a means of procuring the appearance of a suspect for questioning by investigating officers lacking authority themselves for compelling the suspect's presence. The present case, however, does not approach that situation. To begin with, as the court of appeals correctly determined (Pet. App. 21a), the FBI agents who served the subpoena on petitioner could lawfully have arrested him on probable cause at that time. The subpoena, therefore, did not in any way augment the officers' powers beyond those that they already lawfully possessed. This would be true even if the subpoena had operated to coerce petitioner into accompanying the officers to the courthouse. Instead, however, as both courts below held (Pet. App. 21a-22a), petitioner was not under any restraint whatever at the time he gave his incriminating statements to the FBI. Moreover, both courts held (Pet. App. 23a) that the statements themselves were voluntarily given. In these circumstances, then, the use of the "forthwith" subpoena did not violate any of petitioner's constitutional rights.

2. Petitioner also contends (Pet. 7-8) that 18 U.S.C. 3501, which declares that voluntary confessions (like his own) "shall be admissible," is unconstitutional because it represents an exercise by the Congress of a power conferred by the Constitution upon the judiciary. We note first that

the court of appeals did not indicate that, had it not believed itself subject to the command of the statute, it would have exercised its supervisory powers to suppress petitioner's confession. Beyond that, however, we think it plain that Section 3501 is constitutional. As this Court has recognized, the power of the judiciary to formulate and apply rules of evidence is subordinate to the paramount authority of Congress, subject to constitutional limitations, to declare what practices and procedures will govern in the federal court system. *E.g., Gordon* v. *United States,* 344 U.S. 414, 418; *Funk* v. *United States,* 290 U.S. 371, 382, 383. The principle was stated expressly in *Palermo* v. *United States,* 360 U.S. 343, 353, n. 11: "The power of this Court to prescribe rules of procedure and evidence for the federal courts exists only in the absence of a relevant Act of Congress." See also *McNabb* v. *United States,* 318 U.S. 332, 341, n. 6; *United States* v. *Wright,* 489 F. 2d 1181, 1190-1191 (C.A. D.C.); *United States* v. *Crook,* 502 F. 2d 1378 (C.A. 3), certiorari denied, 419 U.S. 1123.[4]

Finally, we note that Section 3501 is in any event consistent with recent pronouncements of this Court regarding the relationship of voluntariness to admissibility:

> The ultimate test remains that which has been the only clearly established test in Anglo-American courts for two hundred years: the test of voluntariness. Is the confession the product of an essentially free and unconstrained choice by its maker? If it is, if he has willed to confess, it may be used against him. If it is not, if his will has been overborne and his capacity

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[4]In addition to Section 3501, Rule 402 of the Federal Rules of Evidence also requires that petitioner's confession be admitted and precludes the exercise of judicial supervisory powers to effect a contrary result.

> for self-determination critically impaired, the use of his confession offends due process." *Culombe* v. *Connecticut,* [367 U.S. 268] at 602.

Schneckloth v. *Bustamonte,* 412 U.S. 218, 225-226.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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